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ABSTRACT

The dismissal of public school teachers in Oregon is governed by the Fair Dismissal Law. The statutory requirements of the law involve (1) a notice from the superintendent of intent to dismiss, (2) school board approval of dismissal, (3) the teacher's right to appeal to the Fair Dismissal Appeals Board (FDAB), and (4) the school board's and teacher's right to appeal the FDAB decision to the Court of Appeals. This bulletin summarizes procedural requirements of the law, then analyzes the case law interpreting the requirements and the applicable procedures mandated by Fourteenth Amendment due process. Significant differences are identified between the procedures to which probationary and permanently employed teachers are entitled in dismissal and nonrenewal cases. Selected FDAB decisions and state court decisions are reviewed to distill the elements of proof and procedures that appear to be required to establish the statutory grounds for dismissal. The final chapter contains a summary and offers recommendations to school district administrators of ways to provide an increased element of fairness to the teacher and also to provide a supportable case if dismissal becomes inevitable. Legal citations are provided in footnotes at the end of the text. (MLF)

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Preface

In this Bulletin, we have departed somewhat from our normal format of reviewing exemplary school programs. This month Steve Pitt reviews procedural requirements of the Fair Dismissal Law and the impact of related Oregon case law and administrative hearing decisions.

Virtually nowhere else do school administrator's decisions more directly and dramatically affect the rights of others than in the teacher dismissal process. This Bulletin attempts to draw together the disparate sources of law that necessarily affect administrative decisions in this area. Recognizing that these decisions must reflect a working knowledge of the teacher's procedural rights, OSSC hopes that this Bulletin will prove to be a valuable resource for Oregon school districts and administrators.

Steve is an OSSC graduate research assistant with an extensive legal background. He has a law degree from the University of Denver and is the author of several surveys of topics in school law.

Philip K. Piele
Executive Secretary

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Introduction

The dismissal of a teacher is clearly a drastic action for a school district to undertake. It may well represent the end of a career and create severe financial and social hardships for the teacher affected. It is obviously not a remedy to be undertaken lightly, as a personal vendetta, or under any other improper motive. It should be considered a final resort after every reasonable effort has been made to assist the teacher in improving performance or correcting deficiencies.

The purpose of this Bulletin is not to encourage teacher dismissal as a remedy or to make dismissal "easier." Implementation of the Fair Dismissal Law is affected by constitutionally based common law procedures that continue to develop. In addition, many provisions of the statute have been interpreted in the courts and in contested-case administrative hearings. Administrators and school boards contemplating the necessity of dismissal obviously need to be aware of these decisions in order to make an informed decision of their own and in order to provide the teacher with the procedures required by fundamental fairness and by law.

This Bulletin attempts to summarize procedural requirements from selected cases and to analyze them in light of the statute. Some recommendations are suggested, but it should be clear that these are not, and are not intended to be, a substitute for legal opinions. The entire process of dismissal properly involves early consultation with the school district's attorney. Failure to involve an attorney or someone knowledgeable in this area of school law may result in both

personal and district liability for procedural omissions or errors.

It is also evident that there are many extralegal considerations that necessarily go into a dismissal decision and its timing and "handling." These will vary from case to case and district to district to a degree that makes them impossible to consider here.

Similarly, the effect of the collective bargaining agreement upon dismissal proceedings should be noted, but cannot be covered in depth.

Collective bargaining may influence both the procedural requirements and the substantive criteria used for formal evaluation or dismissal. In Central Point,[1] the Oregon Court of Appeals held that, although the school board is not required to bargain over dismissal or nonrenewal procedures and criteria (it is a permissive subject for bargaining), it is not prohibited from doing so. If the district agrees to a contractual provision covering this area, it must abide by it--including submission of the issue to binding arbitration if the contract includes a substantive arbitrability clause that encompasses the provision.

The relationship between the contractual provision and the Fair Dismissal Law and the effects of each upon the other before an arbitrator, the Fair Dismissal Appeals Board, or a state court is beyond the scope of this Bulletin.[2] Note, however, that although the contractual provision must not conflict with the statute, it may significantly alter its operation. This may be especially evident where contract dispute resolution culminates in binding arbitration. Arbitrators vary widely in their willingness to interpret and apply state statutes and in the interpretation they may give the specific

language of a dismissal provision or a general "just cause" provision.[3]

Dismissal of Permanent Teachers

The dismissal of public school teachers in Oregon is governed by the Fair Dismissal Law.[4] In this chapter we first outline the statute's procedural requirements for dismissal of a permanent teacher, followed by a more detailed analysis of the statutory requirements, the case law interpreting them, and the applicable procedures mandated by Fourteenth Amendment due process.

Statutory Requirements

1. The superintendent must provide notice of the intent to dismiss. There are specific requirements for the adequacy of the notice.[5]
2. If the school board approves dismissal, the teacher may appeal to the Fair Dismissal Appeals Board (FDAB).[6] Notice is required both of the board and of the teacher.
3. FDAB holds a de novo contested case hearing at which both the district and the teacher may present facts revelant to the truth of the charges and the adequacy of the facts justifying dismissal.[7]
4. FDAB makes a decision and issues a report of findings of fact and its order.[8]
5. The school board or the teacher may appeal the FDAB decision to the Court of Appeals.[9]

Analysis of Statutory Requirements in Light of Case Law and Constitutional Guarantees

The initial procedural requirement involves the timeliness and the content of the superintendent's notice to the teacher of his intent to recommend dismissal. See ORS 342.895(2), Appendix A, which indicates

that, in addition to other requirements, the notice must contain a reference to the statutory grounds for dismissal and a "plain and concise statement of the facts" relied upon for support.

This requirement was reviewed by the Oregon Court of Appeals in Vorm.[10] The Court indicated that the statement should be formulated in terms that correspond generally with the school district's performance standards. There are dicta condemning statements that are conclusory in nature; the clear implication is that the statement will more adequately provide notice if it objectively details the facts relied upon and is not merely a value judgment based on unsupported facts. Failure of the notice to provide a plain and concise statement of the facts may result in summary dismissal of the district's case at the FDAB hearing.[11]

The date of notice is important not only because it is required to be at least twenty days before a dismissal recommendation to the board, but because there is a limitation on the evidence that may be introduced by the district where the statutory grounds are inefficiency, insubordination, neglect of duty, inadequate performance, or failure to show growth/improvement. When any of these are used as grounds for dismissal, the "evidence shall be limited to those allegations supported by statements in the personnel file of the teacher on the date of the notice."

The implications of this language for the district have been spelled out in Vorm and School District No. 48, Washington County v. FDAB, 514 P2d 1114 (1973). The court in these two cases determined that this language does not limit the district's evidence to what is actually

in the file on the notice date, but means that the evidence produced by the district at the FDAB hearing is limited to the "general subject matter" of the statement(s) in the file on that date. The file need not identify all of the sources of the subject matter discussed in order for evidence on the subject to be admissible. The file need not identify all persons who may testify on the subject matter, and those testifying need not have contributed to the file.

For the district's personnel director this means simply that for these five grounds for dismissal, there must be statements in the personnel file prior to the notice date that raise the general subject of the district's allegations. This is essentially a minimum fairness requirement of notice to the teacher in order to allow preparation of a case in response. It does not impose any new burden or severely limit the district, since the support for these grounds will presumably lie in written evaluations[12] and would include a written program of assistance[13] in many cases.

As a practical matter it means that if the district has been evaluating a teacher negatively with regard to, for example, classroom management only and has determined to proceed with a dismissal based upon inadequate performance, the district may be limited to producing evidence that tends to prove a deficiency in discipline. The district may not introduce evidence at the FDAB hearing that is not noted or referred to in the file, for example, that the teacher consistently failed to complete lesson plans or never got grades in on time. Of course, if a failure to complete lesson plans has been noted in the personnel file before the notice date, then it is admissible as a

further example of the grounds cited.

It should be noted that Vorm went on to say that even hearsay evidence may be admissible and may constitute "substantial" evidence at the FDAB hearing. This is true whether or not such hearsay was properly included in the file, unless the teacher is able to contend that he or she was unaware of such evidence in the file or unable to subpoena the authors of the evidence.[14]

Twenty days after the notice the school board may act to approve or disapprove the superintendent's dismissal recommendation. There is no statutory requirement of a hearing prior to board action to dismiss. Nevertheless, there is a strong Oregon case law (Tupper,[15] Oregon Supreme Court; and Vanelli,[16] Ninth Circuit Court of Appeals) indicating that dismissal of a tenured teacher (and the midyear dismissal of a probationary teacher) requires a pretermination hearing to meet the constitutional requirement of Fourteenth Amendment due process.

"Permanent" status or "tenure" is a legitimate and mutual expectation of continued employment created by state law. It is well settled law that a teacher who has attained this status has acquired a property interest that is created by the statute and that falls within the protection provided by Fourteenth Amendment due process against arbitrary government action. Vanelli held that, even though a posttermination hearing can support a dismissal, a pretermination hearing is required, and damages may be recovered for the failure to grant one.[17]

Due process is a flexible term whose requirements vary according to

the factual situation. In order to determine how much process is due at this pretermination hearing the court employs the three-part balancing test of Mathews.[18] The court determines that, absent an emergency situation,[19] such a dismissal requires, at a minimum, notice and opportunity to be heard "at a meaningful time and in a meaningful manner."

Tupper helps to specify these minimum fairness requirements. Prior to dismissal the teacher should be: (1) notified of the "charges against him"--by written notice whenever possible, (2) informed of the sanctions being considered, and (3) given an opportunity to refute the charges either orally or in writing before someone who is either authorized to make the dismissal or to recommend the final decision. As in the Vanelli case, these requirements follow not from statutory interpretation, but from the court's finding of state action (the dismissal), a protectible property interest (implicated in the dismissal or nonrenewal of a permanent teacher or the midyear dismissal of a probationary teacher[20]) and potential liberty interest,[21] and the resulting protection of the Fourteenth Amendment and minimum fairness procedures.

For administrators the lesson is clear: Following the procedures of the Fair Dismissal Law is not enough to protect the teacher's interest and to safeguard the district and themselves against liability for damages.[22] When an administrative decision has been reached that a dismissal will be pursued, the teacher must be given written notice of the charges[23] and the sanction. Note that the statutory notice requirement appears to meet this requisite,[24] but the teacher

must also be provided an "informal" opportunity to meet with the superintendent to orally refute the charges or present a written explanation before the board votes to dismiss. This meeting is not required to assume the dimensions of a full evidentiary hearing[25] with a right to counsel, to present evidence, to cross-examine witnesses, and so forth.

The options for meeting this pretermination hearing requirement include: (1) the superintendent may hold an informal hearing, (2) the school board may hold an informal hearing, (3) the school board may hold a full evidentiary hearing. Although individual school districts and their attorneys may identify competing considerations, it seems as though the latter option is worthy of close attention. Beyond the fairness considerations, an evidentiary hearing would allow the board to determine--based upon all the facts--whether the dismissal is warranted and supported by adequate evidence. In addition, the board will have an opportunity to see how the case will appear at the FDAB de novo hearing and better determine if the time and cost involved are justified.

The FDAB hearing is "de novo" in that it is an entirely new look at all the evidence both parties can bring to it. There is no limitation on the introduction of new evidence from either party.[26] The Oregon Supreme Court in Ross [27] analyzed the statutory language[28] regarding the FDAB review and determined the scope of the FDAB responsibility. The court rejected the school district's contention that the district has the authority to interpret and apply the statutory grounds subject to FDAB review only for factual accuracy and an unreasonable, arbitrary, or excessive sanction. By statute the Appeals

Board must consider "any written standards of performance" adopted by the school board,[29] but the primary responsibility for interpreting the cause portion of the statute (ORS 342.865 [1] a-i) remains with the Appeals Board. This appears to effectively overrule that portion of the Vorm decision that held that local district standards for performance were the only criteria the FDAB could use in deciding a dismissal case.

The FDAB is charged with three inquiries under ORS 342.905(5):

1. Whether the facts alleged are true and substantiated. There will not be a dispute over material facts in every case, but where there is, the board must be convinced that the facts the district alleges in support of the dismissal grounds are "true and substantiated." Although it is unclear precisely what level of evidence this corresponds to, it seems likely to be more than "substantial evidence" and possibly as much as "clear and convincing." The actual type, weight, and probative value of the evidence required to convince the board will undoubtedly vary with the grounds cited, the attitudes of the parties, the composition of the board itself, and other intangibles.

2. Whether the facts are adequate to justify the statutory grounds cited. The nature of this inquiry is essentially to answer the question, Has the district properly matched the facts with the statutory ground it has cited? The FDAB will not consider grounds other than those cited by the school district. Failure to cite the proper grounds risks dismissal of the case even though other, more appropriate grounds might exist that the facts would have supported. This is another example of why the

district should publish its own standards and understand what elements are necesary to adequately support each statutory ground.

FDAB authority under this portion of the statute is interpretive rather than legislative.[30] Although the board also has the option of accomplishing this interpretation through the issuance of interpretive rules, it has chosen thus far to do so only through contested-case orders. It is only through an analysis of these decisions--the subject of chapter 3--that a district may determine what FDAB considers "inadequate performance," "insubordination," or any other statutory ground.

3. Whether the sanction was arbitrary, unreasonable, or excessive. Has this sanction been uniformly applied in this district in the past to teachers in similar fact situations or with similar histories/deficiencies? Or has the district singled out an individual for different and discriminatory treatment? Does the punishment "fit" the deficiency, or is there simply no basis in fact or logical connection between the facts and the sanction? These are questions the district must answer to the board's satisfaction.

If the board finds that the facts alleged are true and substantiated, that the facts are adequate to justify the grounds cited, and that the sanction was not arbitrary, unreasonable, or excessive, then the board must uphold the dismissal and defer to the school board's judgment concerning the sanction. The Oregon Court of Appeals in Mayer [31]

held, "It is not for FDAB to determine whether it would dismiss the teacher, but whether there is some evidence to justify the 'grounds cited as reasons,' not the dismissal itself."

After the FDAB issues its decision, either the teacher[32] or the school board may appeal to the circuit court. On appeal, the court is limited by ORS 183.482(8) in the scope of its review.[33] In most cases the review will be focused only upon whether there is "substantial evidence"[34] (some evidence--more than a scintilla) in the record to support the FDAB decision. This is not a high degree of evidence nor a difficult burden to impose upon the hearing. It may be fairly said that it will be the unusual case in which the board's finding cannot be said to be supported by substantial evidence. The court review will not include a new hearing of the evidence nor an independent determination of whether the evidence does or does not justify dismissal. Just as the FDAB may not substitute its judgment for that of the school board, neither may the court substitute its judgment of the equities involved.

Dismissal of Probationary Teachers

By virtue of the distinctions made within the Fair Dismissal Law, there are significant differences between the procedures to which probationary and permanent teachers are entitled in dismissal and nonrenewal cases. ORS 342.815(6) defines a probationary teacher as any teacher who is not "permanent." Under S. (5) of that statute a permanent teacher is defined as any teacher regularly employed for at least three successive school years and who has been reelected by the district for the following school year.

In the Humphreys [35] case, the Oregon Court of Appeals had occasion to attempt to distinguish between permanent and probationary teachers. In determining that the teacher was permanent, the court looked first to the definition of "teacher"[36] and found that there was no issue of certification. To discover whether she was "employed half time or more as an instructor," the court looked to the definition of "instruction" in ORS 342.120(5): "direction of learning in class, in small groups, in individual situations, in the library and in guidance and counseling." The court found that behind-the-wheel driver training involves a one-to-one or small group learning situation and that a certificated teacher so employed for four successive years at more than half-time gains permanent status. Max Riley,[37] research associate in the Center for Educational Policy and Management at the University of Oregon, has suggested that this decision may have a potentially wider impact than the specific facts. In a footnote to the case, the court specifically rejected the argument that, because certification is not

required to teach behind-the-wheel driver's education, there has been a legislative determination that this is not "teaching."[38] This decision leaves open the potential for an employee engaged in "instruction" (e.g., a teacher's aide) and who also has a teaching certificate of some kind to acquire tenured teaching status even though not hired by the district as a certificated teacher.

Nonrenewal

Nonrenewal[39] of a probationary teacher may be "for any cause it (the school board) may deem in good faith sufficient." Notice of intention to nonrenew must be given by April 1 to the probationary teacher. Wesockes [40] held that even though there was no nonrenewal notice given before April 1, the third-year teacher remains a probationary teacher until the end of the third year and may be dismissed as such before that time. However, this case was decided before ORS 342.840 became effective.

Under this statute a teacher employed for 135 consecutive days in a school year receives credit for a full year. It may not be possible to dismiss or nonrenew a third-year teacher--except as a permanent teacher--after he or she has been employed 135 consecutive days of the third year.

If the probationary teacher requests it, the school board must provide the teacher with a written copy of the reasons for nonrenewal. Jinkerson [41] held that the good faith reason requirement of this statute is a "very narrow" limitation on a school district's judgment in personnel matters. It may mean only that the reason cannot be constitutionally impermissible.[42] In any case, the burden is on the

teacher to plead and prove bad faith on the part of the board in the nonrenewal decision. The board's failure to follow its policy and procedures was not enough, in this case, to show bad faith.

The probationary teacher must also, if he or she requests it, be given a "hearing" before the school board. Note that the notice of intention to nonrenew, delivery of the requested reasons, and the hearing must be provided before the actual "decision" (board's vote) to nonrenew.

In Henthorn,[43] the court held that this hearing was intended to provide more than merely an "opportunity to be heard". The teacher must have "at least an opportunity at the hearing to offer evidence to contest the 'reasons for non-renewal' and to demonstrate that such 'reasons' are false; that the board will at least consider such evidence in good faith, and then will make a 'determination' or 'decision' whether or not to make final its previously 'intended action', and that some kind of an appeal to the courts was also intended."

Any such appeal from the hearing is limited by ORS 342.835(3) to the procedures at the hearing[44] and depends on whether notice of nonrenewal was timely given. Conspicuous in its absence from this statute is an opportunity for the probationary teacher who is either nonrenewed or dismissed to appeal the sufficiency of the evidence presented at the hearing. The Oregon Supreme Court in Maddox notes that the intent of this statute was "to give to probationary teachers a limited measure of procedural protection from arbitrary termination, but to leave the substantive determination to terminate with the school districts, to allow flexibility in probationary teacher decisions and to

avoid embroilment in extended termination procedures."

The Oregon Court of Appeals found that probationary teachers have no property interest in their jobs with regard to nonrenewal in Papadopoulos.[45]

Dismissal

The dismissal of a probationary teacher during the term of the contract includes some additional procedural safeguards emerging from the greater property interest involved in a midyear dismissal. The teacher must be given a copy of the reasons "considered in good faith sufficient" whether requested by the teacher or not. A hearing before the board must be provided "upon request" and, as with nonrenewal, before a final decision is made.

Maddox[46] held that midyear dismissal of a probationary teacher implicates a constitutionally protectible property interest.[47] In deciding what process is due, the court employs the balancing test of Mathews and determines that protection of the property interest requires at least:

1. Written notice of the reasons for dismissal.
2. An opportunity to be heard informally before the board acts.
3. After dismissal (or before--presumably at the board's option) a public hearing before the board at which:
   a. he may be represented by counsel and
   b. he has an opportunity to question the principal who recommended his dismissal.
4. In addition, the decision-maker whose good faith is in question (the school board) must be a step removed from the official

(the principal) who ordinarily supervises the probationary teacher and recommends termination. The court also finds that the fact that the school board members initially decided to dismiss the teacher does not, by itself, indicate an impermissable bias.

Maddox holds that procedural adequacy must be considered in light of both the pre- and posttermination procedures, and also in light of the nature of the protected interest. In this case the procedures were admittedly[48] less complete than those required in Tupper, but Tupper's property interest (tenure) was "more significant." Similarly, one might expect that where the "good faith" reasons have to do not with a deficiency so mundane as punctuality (as in Maddox) but, for example, with immorality, there may well be protectible liberty interests implicated that would require significantly greater procedures.[49]

This is a particularly complex area for administrative decision. It may be difficult to determine exactly what protectible interests are involved and how much process is therefore due. Unlike student suspension, teacher dismissal is likely an occurrence rare enough in a district's operations that the increased administrative time and expense of additional procedural protections may be well justified. In due process proceedings, the appearance of fairness, as well as fairness in fact, is essential.

Analysis of FDAB Decisions

This chapter reviews selected FDAB decisions and state court decisions in an attempt to distill the elements of proof and procedures that appear to be required to establish the statutory grounds for dismissal.

Inadequate Performance

With regard to procedure when inadequate performance is the ground cited, ORS 342.865(2)-Appendix A indicates that, although evidence is not limited to formal evaluations, the latter must tend to support the charge. Similarly, the district's own written standards of performance must appear to be violated, and the district must have provided a "written program of assistance for improvement."

A district that proceeds to a dismissal hearing on inadequate performance charges may be faced with real difficulties if:

1. There is no history of the specific deficiency in the formal evaluations, including a statement recorded in the personnel file that refers to the subject, before the date of notice to the teacher;
2. The deficiency does not violate or fall within the district's own published standards of performance;
3. The district has not attempted to aid the teacher in overcoming an identified deficiency through a written plan of assistance, or the plan of assistance is too complex with too many directions (Skeen) [50];
4. The district fails to follow the pre- and postevaluation

procedures of ORS 342.850(2)(b), as noted in Skeen. Note, however, that Holcomb (discussed later in this section) demonstrates that not every failure of procedure will be a basis for reversing a dismissal;

5. The district fails to follow its own evaluation procedures.

Failure to follow evaluation and appropriate plan-of-assistance procedures may evidence an impermissible, bad faith use of the evaluation procedure for the purpose of supporting dismissal charges[51] rather than improving instruction as mandated by statute.[52] Although the state courts will review a procedural failure only if "substantial rights" were prejudiced,[53] the FDAB may accord the failure greater weight--as tending to demonstrate bad faith on the district's part. In addition, the FDAB has the authority to direct reinstatement if procedures designed to protect the teacher are not followed.[54]

The FDAB in Nance [55] defined inadequate performance as "unwillingness or inability to assume duties expected of a teacher in preparation, execution of duties and display of mature judgment." Chubb [56] indicates that it would also include an inability to convey knowledge/subject matter or an inability to teach the subject matter in an adequate manner. There is an indication in this case that inadequate performance must be more than "mere inefficiency" and must clearly hinder the educational process. The FDAB said, "there would need to be demonstrated that the ... (deficiency) has been detrimental to the educational process to such a degree as to warrant a teacher's immediate removal." In addition, this is more difficult where the teacher has

"conceded good qualities." Other and more recent cases have not gone so far in requirements for establishing inadequate performance.

The board in Chubb referred to and certainly considered the district's apparent lack of effort to aid the teacher, Instead of limiting his class size, the district assigned him problem students, and the assistance he received consisted mostly of counseling and advice to do better. Most devastating to the district's case, however, was the lack of evidence tending to show that, because of the classroom management problems, student's ability to master the material was impeded.

In the FDAB decision in the Washington County [57] case, the allegations were that the teacher's communication with students was ineffective and that his teaching techniques were limited. The FDAB determined that neither charge was "true and substantiated" and thus did not reach the question of whether the allegations were sufficient to support a charge of inadequate performance. There is some indication in the case that these allegations would have to be supplemented by evidence that went more directly to the teacher's inability to actually convey knowledge. Examples might be a high incidence of dropout from classes, low class morale, a lack of student motivation, and so forth.

The district in the Owen [58] case was able to point to an "abnormally high" number of parent complaints and requests for student transfers. The teacher failed to comply with orders and directives and failed to take advantage of the district's attempts to help her improve. Although the "attitude" of the teacher is more properly a consideration under insubordination than adequate performance, Owen, Chubb, and Skeen

together indicate that the attitude of both the teacher and the district may in fact be a significant, if unspoken factor at the FDAB hearing.

Pecka, [59] however, shows that good intentions, a good "attitude," and desire to improve are not enough in themselves to disprove inadequate performance. In this case the performance related to "student management" and failure to follow district regulations on physical discipline. There was long history of good intent, desire to improve, and occasional improvement, followed by repeated failure to sustain the improvement. District attempts to aid improvement were "understandably exhausted."

In Holcomb [60] the teacher's deficiencies were identified as failure to use appropriate teaching techniques. The FDAB concluded, "although she may have been an acceptable teacher in many respects, her record keeping was unacceptable." It should be noted that the record keeping failure meant a potential loss of funds for the district (under PL 94-142) in this case.

The FDAB in Brown [61] cited the teacher's poor organization, planning, preparation, and class management and her inability to carry out directions and suggestions for improvement during the plan of assistance provided by the district.

Insubordination

Insubordination is defined in North Clackamas [62] as "an intentional and willful refusal to obey, or disobedience of, an order or directive which a school board is authorized to give and entitled to have obeyed." A review of some of the case hearings involving a charge of insubordination shows some emerging elements that FDAB considers in a

charge of insubordination:

1. The teacher's attitude must evidence an intentional and willful refusal to obey, as opposed to a cooperative attempt to obey and a failure due to a lack of ability to obey (Pecka).
2. Skeen and North Clackamas suggest that there must be more than one incident of misconduct and that the incidents must establish a "pattern of misconduct" and not be unrelated, isolated, and random. The court in North Clackamas cites a California case[63] as support for the assertion that insubordination implies a "general course" of defiant conduct as opposed to disobedience to a single, specific order. It is unclear whether this is a true prerequisite and would be required regardless of the circumstances, as, for example, where student health or safety were involved or where the disobedience caused or foreseeably would cause a substantial disruption.
3. A clear rule or directive must be involved that the district has the authority to promulgate and expect to be obeyed. This includes mandating a specific instructional technique (Owen) or an order to follow district policies, standards, rules, and regulations. The district's authority in this regard was found to be implied in Keene.[64] On appeal to the Court of Appeals the majority held that they could not find as a matter of law that it was an error for FDAB to hold that the district had the authority to require a teacher still on leave to give notice of his intention to return, even though no established

procedure or rules to that effect existed. The teacher in this case ignored repeated requests to give such notice.

4. There must be a direct and unequivocal order to do or not to do something that is within the teacher's capacity to respond to and not merely a suggestion for improvement.
5. The FDAB may in some cases require (1) a good faith effort by the district to correct the behavior or at least to put the teacher on notice of the actions that are unacceptable, (2) direction as to what is acceptable, and (3) time/opportunity to correct the behavior and disclosure of the sanctions that may be expected if it continues. This may be required to rebut the presumption raised by the district's continued reemployment of a teacher who has been engaged in continuing actions that are objectionable to the district. (This subject is discussed more fully in chapter 4.)

Key distinctions between the allegations of insubordination and inadequate performance are the teacher's attitude and ability to comply. In order to support a charge of insubordination, the teacher must have the ability to conform and yet evidence an unwillingness to do so. The converse is not true for inadequate performance, however, since it may be founded on either inability or unwillingness to perform.

Immorality

Ross is a leading case concerning the charge of immorality. As noted, the Oregon Supreme Court recently held that primary responsibility for interpreting "immorality" (as well as other statutory grounds) lies with FDAB. The board must nevertheless "consider"[65]

local district standards in determining whether the facts alleged substantiate the grounds cited. This may be particularly appropriate for a charge of immorality, where local standards may be expected to vary between communities.

Where, as in Ross, the school district has not published rules or policies defining immorality, then in order to constitute immorality, sexual conduct must "violate either the moral standards of the school community or the moral standards of the people of Oregon." In addition, the teacher must have actual or constructive notice of the moral standard that he or she is accused of violating. Assuming no actual notice, there is constructive notice if the facts of the case are sufficient to enable the FDAB "to conclude that the teacher nevertheless should have known of the standard and should have known that his conduct violated that standard." An example of such constructive notice would be where the conduct is "universally condemned" and the teacher should have expected a "strong negative reaction" against him or her resulting from having engaged in the conduct. An interesting contrast to Ross is the Ninth Circuit Court of Appeals case of Burton, [66] in which the teacher was an admitted homosexual, but no overt homosexual activity was involved. The original FDAB decision in Ross contained a concurring opinion that distinguished Burton from Ross on this ground.

In addition to a violation of the community's moral standards and the requirement of actual or constructive notice, there must be a "job nexus" such that the teacher's behavior negatively affects his or her ability to carry out required responsibilities. In Ross the FDAB concluded that this did not mean that there had to be an actual

demonstration that the teacher could no longer function effectively. The board found that the parent-teacher relationship was damaged and that the teacher's conduct demonstrated that he could not "promote high moral standards or serve as a role model for his students".

It is worthwhile noting that the FDAB was able to ground each of these failed requisites (having good parent-teacher relationship, promoting high moral standards, acting as a role model) in the school district's policy requirements. The rationale of the case focused more on the public nature of the acts and the subsequent erosion of the teacher's effectiveness than upon any moral or illegal aspects.

In another case involving a charge of immorality, the FDAB found the facts not true nor substantiated and rejected the dismissal. The Board in Ewart [67] determined that the teacher had not deliberately fondled his female students and that any touching had been accidental or inadvertent.

Inefficiency and Neglect of Duty

Both of these grounds are closely enough related to inadequate performance to be virtually indistinguishable for practical purposes. They are often alleged together under the same set of facts. Inadequate performance, by definition in Nance, includes poor performance of required duties. Although it is within the proper scope of the school district's authority to choose to more closely define, and thus distinguish between, facts that would properly fall within each ground, FDAB has not yet done so itself. In several cases inefficiency and/or neglect of duty were alleged in combination with insubordination or inadequate performance. Although FDAB has had no difficulty

distinguishing between insubordination and inadequate performance, the board has chosen not to specifically delimit the facts it has relied upon in also finding inefficiency (Holcomb and Brown) or neglect of duty (Keene).

In Holcomb, the FDAB noted the confusion but declined to resolve it: "The terms are closely related and in many instances interrelated." The facts alleged were failure to keep records, to teach by approved methods, and to maintain discipline. They were found to support both inadequate performance and inefficiency.

In Keen, the board was able to find that the facts supported the charges of insubordination and neglect of duty, but not inefficiency nor inadequate performance. Unfortunately, there is no elaboration on the reasons, so the reader is left without guidance in distinguishing the elements that may have been relied upon.

Lack of Professional Growth or Improvement

Teachers have at times been charged with failure to comply with such reasonable requirements as the board may prescribe to show normal improvement and evidence of professional training and growth.

This charge was found to be supported by the facts in both Holcomb and Brown, but suffers from the same failure of precise definition as inefficiency and neglect of duty. In both cases this ground was alleged along with inefficiency and inadequate performance, but the facts going to each are not identified. We may speculate that a failure to show normal improvement and evidence of professional growth does not necessarily imply the type of deficiency or inability in the teacher that inefficiency and inadequate performance would seem to require. The

teacher in this case might have originally been performing at an adequate level yet failed to show normal improvement or may still be at an adequate performance level yet fail to meet the school board's "reasonable requirements" for professional growth and training.

In order for their requirements to be deemed "reasonable," the board will likely have to provide the teacher with adequate notice and time to comply. If challenged, they may well have to demonstrate a reasonable connection between the requirement and the efficient operation of the school.

Revocation of Certificate

A teacher may be dismissed for any cause that constitutes grounds for the revocation of his or her permanent teacher's teaching certificate. Grounds for revocation are found in ORS 342.175(1): "Action to suspend or revoke any certificate or to discipline a teacher or administrator may be initiated by the Teacher's Standards and Practices Commission, created under ORS 342.350 upon complaint charging the teacher or administrator with:

a. Conviction of a crime not listed in subsection (2) of this section;

b. Gross neglect of duty;

c. Any gross unfitness; or

d. Having been convicted of violating any law of this or any state of the United States involving the illegal use, sale or possession of controlled substances."

Ross makes it clear that it is the TSPC and not FDAB that has the authority to interpret this statute. The TSPC stands in the same

relationship to this statute as the FDAB does to the Fair Dismissal Law. Consequently, the FDAB may not independently determine that the facts support a finding of "gross unfitness," but must defer to the TSPC decision at the revocation hearing, or its decision whether to have a hearing at all.

Only after the commission decides to proceed to a revocation hearing, applies the statutory term to the facts, and determines that revocation should take place under the statute may the FDAB then support a dismissal based solely upon a violation of ORS 342.865(1)(i).

As a practical matter, if the district includes an appropriate (1)(i) allegation, it may expect the FDAB to defer a decision on this ground until after the commission hearing decision.

Other Grounds

No cases were reviewed that involved either of the two remaining grounds: (1) Physical or mental incapacity and (2) conviction of a felony or of a crime involving moral turpitude.

Summary and Recommendations

The Fair Dismissal Law[68] is unequivocal about the primary purpose of formal teacher evaluations: They are to be implemented to help the teacher improve performance, not to support dismissal proceedings. A review of Fair Dismissal Appeals Board cases (especially Chubb, Skeen, and Taylor) makes it clear that it is not only the teacher's attitude that is given consideration. Evidence of a district's lack of commitment to aid teacher improvement where the teacher has shown a willingness and desire to correct deficiencies[69] may put the district in an awkward and indefensible position on review at the FDAB hearing. In addition, the district may have to rebut the presumption implied in the continued rehiring and advancement on the salary schedule[70] of one whose past performance is so inadequate as to warrant dismissal.

Three Positive Suggestions

Riley suggests three steps through which the district may provide an increased element of fairness to the teacher and also provide a supportable case in the event that improvement does not follow and dismissal becomes inevitable.

Maintain Objective Evidence

The problem or deficiency must be clearly identified through reference to objective evidence. Vorm indicates that such evidence should be "formulated in terms which correspond generally with the school district's performance standards." Although Vorm allows its use,

there is an indication that subjective conclusion and opinion may not always be sufficient to support the requirements of a "plain and concise statement of the facts relied on."[71] The district should convey to the teacher--prior to a dismissal decision--the specific unsatisfactory behavior that the district has identified.

Help the Teacher Improve

The district should give specific recommendations for improvement, phrased in terms of a clear and concise directive. Chubb indicates that mere "counseling and advise to do better" are insufficient.

When inadequate performance is involved,[72] a written plan of assistance is required by ORS 342.865(2). This plan must not be unnecessarily complex and must be designed to accomplish a change (Skeen). The district must evidence a genuine attempt to help the teacher improve the deficient performance rather than an effort to gather evidence to support a dismissal or to create an impossibly complex plan not realistically designed to accomplish a change. Assuming that there is a "genuine" effort by the district, the FDAB has recognized (Pecka) that the district need not continue "forever" with the assistance simply because the teacher wants to improve but is unable to sustain improvement.

Escalate the Consequences

The district should escalate the degree of consequences each time there is an observed failure to meet standards and/or follow the directive. By way of example, the progression might be from oral to written reprimand, to failure to advance on the salary schedule, to

threat of dismissal, to actual dismissal proceedings. Each observation or evaluation of failure to follow an order should be brought to the teacher's attention and discussed with regard to the results observed. The formal evaluation results must refer to and support allegations regarding inadequate performance or insubordination based upon performance, even though the district is not limited to formal classroom evaluation as a method of performance measurement.

A potential future procedural requirement should be noted. The Weingarten [73] case, based upon court interpretation of the National Labor Relations Act, held that an employee has a right to have a representative present at the meeting where it may be expected that evidence will be obtained for use in discipline. The language of the Public Employee Relations Act has not yet been interpreted in the same manner. If it is so interpreted, the district may have to allow the union representative or the teacher's legal counsel to be present at the pretermination hearing required by Vanelli and Tupper. The teacher would have the right to confer with and be advised by such representatives, but they (the representatives) would not have the right to be heard at the meeting.

Summary of Recommendations

The suggestions made above are incorporated here with a summary of the procedural requirements and recommendations from the chapters on permanent and probationary teachers. This does not include all of the statutory procedural requirements.

- The district should develop and publish standards for each of the grounds listed under ORS 342.865(1).

- The district must show a willingness and desire to aid the teacher in correcting identified deficiencies and must not appear to be merely collecting evidence to corroborate a dismissal charge.
- The district should give specific recommendations/directives for improvement.
- Notice should be given to the teacher of an identified deficiency with sufficient time for improvement.
- A written plan of assistance may be required in some cases, and it must not be too complex.
- The district should escalate the consequences with each failure to follow the directive.
- The district should secure the aid and advice of the school district's attorney early in this process, preferably before the pretermination hearing. The attorney should be requested to review the statutory grounds, the procedural requirements, the evaluations and other evidence, and the plan of assistance or other attempts to aid improvement.
- The district's own evaluation procedures must be followed, as well as the statute's procedural requirements and constitutional requirements of due process.
- The statutory notice to the teacher should be formulated in terms that correspond to the district's performance standards. The notice should objectively detail the facts the district is relying upon and should not consist of vague and conclusory value judgments.

- There should be statements in the formal evaluations in the teacher's personnel file that support the allegations. These must be present before the teacher is given the statutory notice.
- Supporting observations--informal evaluations, directives, disciplinary actions, or warnings--and their dates and results should be noted in writing.
- The pretermination hearing required to protect the permanent teacher's property interest must include: (1) notification of the charges--in writing where possible, (2) notification of the sanctions being considered, and (3) an opportunity to refute the charges either orally or in writing before the superintendent or the board.
- For the nonrenewal of a probationary teacher the district must give notice before April 1 and before a third-year probationary teacher has completed 135 consecutive days in the school year. Prior to a decision the board must, if requested, provide a written copy of the reasons and an informal hearing at which (1) the teacher is allowed to offer evidence to contest the reasons and to demonstrate that the reasons are false, (2) the board must consider the evidence in good faith before it makes a final decision, and (3) appeal may be taken to the courts based upon the procedures at the hearing and whether notice of nonrenewal was given.
- In the dismissal of a probationary teacher, the district must provide the teacher with a copy of the reasons, whether requested or not. In addition, protection of the teacher's property

interests requires a pretermination hearing, if requested, that would include at least (1) a written notice of reasons, (2) an opportunity to be heard informally before the decision is made, and (3) a public hearing before the board at which he or she may be represented by counsel and has an opportunity to question the principal who recommended dismissal.

Footnotes

1. Central Point School District No. 6 v. ERB, 27 Or App 285 (1976).
2. The effects will depend largely upon the specific wording of the provision, the effect of the provision when the contract is read as a whole, and the forum from which a decision is sought--arbitration hearing, FDAB hearing, or state court review.
3. Administrators should be aware that just cause provisions (e.g. "no teacher shall be disciplined, reprimanded, or otherwise reduced in rank except for just cause") have been interpreted by some arbitrators to require a number of specific procedural steps aimed at minimum fairness for the teacher. Such provisions have also served as the basis for some arbitrators to review the substantive grounds and the sufficiency of evidence (the "merits" of the case). See Grievance Guide, 6th Edition, 1982, Bureau of National Affairs, Inc. Washington, D.C.
4. ORS 342.805 to 342.955.
5. ORS 342.895(2).
6. ORS 342.905(1).
7. ORS 342.915.
8. ORS 342.905(3),(4),(5).
9. ORS 342.905(8).
10. Vorm v. David Douglas School District No. 40, 45 Or App 225 (1980).
11. Shipley v. Salem School District 24J (FDAB, March 10, 1982. See also Zollinger v. Warner, 286 Or 19 (1979), where the court found that the legislature "intended the FDAB to have the authority to

direct reinstatements, if procedures to protect the administrator (re: teacher) have not been followed, until such time as the protection of procedures is given."

12. ORS 342.865(2).

13. ORS 342.850(2)(b)(D).

14. The hearsay evidence in the case took the form of reports of parent complaints about the teacher. A district might nevertheless be well advised against proceeding with evidence that is wholly or primarily hearsay. Although this (FDAB) is an administrative hearing and not a criminal trial and although not all procedural requirements of such trials are required, still there is a vested property interest and potential liberty interest at stake and significant procedural requirements do apply. The court in Vorm has shifted the burden to the teacher to rebut what would likely, in another court, be inadmissable evidence.

15. Tupper v. Fairview Hospital, 276 Or 657 (1976).

16. Vanelli v. Reynolds School District No. 7, 667 f2d 773 (1982).

17. Vanelli involved a midyear dismissal of a probationary teacher under circumstances that implicated both a property and a liberty interest. The court held that liberty interest damages were recoverable for "mental and emotional distress actually caused" by failure to provide a pretermination hearing, but not for the distress attributable to the "justified deprivation." The court held that there were no compensable property interest damages (lost employment benefits) since the termination was justified and supported by a posttermination hearing. This raises a question of

what damages will be available to a permanent teacher where only a property interest and no liberty interest is involved and the FDAB de novo review supports the dismissal decision but there has been no pretermination hearing. Although permanent teachers have an arguably greater property interest than probationary teachers (because of their stronger expectation of continued employment), a dismissal "justified" and supported by a posttermination hearing would presumably not be cause for granting more "lost employment benefits" than those due Vanelli. Although the Constitution clearly requires a pretermination hearing, a dismissal involving "merely" a property interest thus may not be compensable even in its absence.

Not every dismissal of a permanent teacher will implicate a liberty interest; only those that sufficiently damage the teacher's good name, honor, reputation, integrity, or ability to secure future employment would do so. Riley suggests a continuum of teacher deficiences in which, at the upper end, a liberty interest clearly attaches. This would include allegations of dishonesty, immorality, and incompetence, but not chronic tardiness (Maddox).

18. Mathews v. Eldridge, 424 U.S. 319, 96 S.Ct. 893 (1976). The factors to consider are (1) the private interest that will be affected, (2) the risk of erroneous deprivation, and (3) the fiscal and administrative burdens of additional procedural requirements.

19. Presumably this would have to involve an actual or forecastable

threat of disruption to the classroom, school, or students. Tinker v. Des Moines Independent Community School District, 393 U.S. 503 (1969).

20. It is well settled law that a probationary teacher has a property interest in his position during the term of his contract.

21. Note that these cases (Tupper and Vanelli) seem to indicate that a liberty interest may be implicated in the nonrenewal of a probationary teacher, in which case the district would be required to provide a pretermination hearing before the nonrenewal decision was made, or be subject to damages arising out of the failure to provide it. Again, the liberty interest is not implicated in every nonrenewal. Clearly, if the reasons cited allege immorality or incompetence, a liberty interest is more likely to be found to exist.

22. A S. 1983 tort action may lie against either the district, the superintendent, or individual school board members if a person, acting under color of law, deprives the plaintiff of a constitutionally protected right. Both the district and individuals (board members and administration) would qualify as "persons," and the fact that they are state officials places their school-related action "under color of law." The alleged constitutional deprivation would be the right to Fourteenth Amendement due process procedures required for dismissal or nonrenewal.

The Supreme Court in Wood v. Strickland, 420 U.S. 308, held that an individual school board member (and presumably an

administrator) has a qualified "good-faith" immunity from damages under S. 1983 suit unless he "knew or should have known" that the action he took within the sphere of his official responsibilities would violate constitutional rights. The Court in Owen v. City of Independence 100 U.S. 1398 (1980), reiterated that the good-faith defense remains intact for some government officials but is no longer a defense for municipalities (school districts). They may not assert the good faith of their officers as a defense to S. 1983 liability.

23. The charges should include more than a reference to the statutory cause relied upon. Even if the notice is not being relied upon as the statutorily required notice, it should nevertheless include a "concise statement of the facts relied upon to support the grounds for dismissal." Although the case law does not specifically require this, a failure to provide the facts goes to the essence of "minimum fairness" since it is knowledge the teacher must have to exercise the right to refute the charges.

24. Riley suggests that, since the clear implication from a statutory dismissal notice is that an administrative decision has been made, minimum fairness would seem to warrant and perhaps require that the constitutionally prescribed notice and "hearing" be afforded before the required statutory notice.

25. Although the court in Tupper does not spell out precisely how much is required of this "hearing," the language of the decision is closely analogous to that of Goss v. Lopez, 419 U.S. 565 (1977), where the Supreme Court found that minimum fairness required that

a student facing suspension be given at least an informal opportunity to present his or her side of the situation. It is nevertheless difficult to analogize precisely from Goss to say that "informal" means nothing more than the right to make a statement in one's behalf. The teacher dismissal "hearing" obviously involves considerably more important rights than temporary student suspension. This has to be balanced against the fact that the teacher will still have an opportunity to a full evidentiary hearing at the FDAB de novo hearing (Maddox).

26. Except for one limitation mentioned previously: the evidence must be supported by statements in the personnel file on the date of the notice of intention to recommend dismissal--ORS 342.895(2).

27. Ross v. Springfield School District No. 19, 294 Or 357 (1982).

28. ORS 342.905 (5),(6),(7).

29. In order to be considered by the FDAB, the local standards of performance must be officially adopted by the district and published to the teachers (School District No. 48, Washington County). Thus it obviously benefits the district to adopt specific performance standards for its teachers, or they will be forced to accept and apply only those standards developed by the FDAB.

30. In Ross v. Springfield School District No. 19, 294 Or at 367, the court notes that the statute's terms fall into the second of three possible classes of terms, each with a different range of agency "responsibility for definition." This statutory class includes "inexact terms which comprise a complete expression of legislative

policy," leaving the function of interpretation to the agency.

31. Lincoln County School District v. Mayer, 39 Or App 99, 591 P 2d 755. This case involved the FDAB finding that the facts were true and substantiated and that the facts justified the grounds cited, but the FDAB "disagreed" with the school board that the teacher should be dismissed. This decision involved the FDAB going beyond its statutory power by substituting its judgment for that of the school board in determining to proceed with the remedy or sanction chosen by the district. Note the subtle distinction between this case and one in which the FDAB grounds its decision/judgment in statutorily authorized power and finds that the dismissal is unreasonable or excessive. A close reading of FDAB cases indicates that there is a real question of whether the FDAB's decisions reflect the constraint which the Mayer court found compelled by the statutory language of ORS 342.905(5).

32. For an Oregon appellate court case holding that a teacher's failure to meet the statutory timeline for notice of appeal is fatal to the FDAB's jurisdiction over the case, see Hood River School District v. Fogle, 30 Or App 699 (1977).

33. ORS 183.482(8) provides: "The court may affirm, reverse or remand the order. The court shall reverse or remand the order only if it finds:

"(a) The order to be unlawful in substance or procedure, but error in procedure shall not be cause for reversal or remand unless the court shall find that substantial rights of the petitioner were prejudiced thereby; or

"(b) The statute, rule or order to be unconstitutional; or

"(c) The rule which the order enforces or upon which the order is based or dependent, is invalid under the provisions of subsection (3) of ORS 183.400: or

"(d) The order is not supported by substantial evidence in the whole record."

34. See Barnes v. FDAB, 548 P2d 988 (1976) and Whitaker v. FDAB, 25 Or App 569 (1976).

35. Humphreys v. Bethel School District #52 54 Or App 867, 636 P2nd 463 (1981). Modified 55 Or App 777 (1982).

36. ORS 342.815(8).

37. Riley teaches graduate courses in the school law sequence in the Division of Educational Policy and Management, University of Oregon.

38. The court supported its reasoning as follows: "ORS 342.815(8), which defines 'teacher,' relates to the qualifications of the person, not those for the position, i.e., a teacher is not 'a person who holds a position requiring a teacher's certification,' but a person who holds the certificate and is employed as an instructor or administrator more than half time."

The court, however, ignored the potentially strained results of such an interpretation and the unstated but implied conclusion to the definition of S. (8), "in a position for which the certification qualifies them and for which the certification is required by law."

39. ORS 342.835(2),(3).

40. Wesockes v. Powers School District No. 31, 57 Or App 652 (1982).

41. Jinkerson v. Lane County School District No. 19, 75 Or App 222 (1974).

42. For example, a teacher may not be dismissed because of his or her exercise of constitutionally protected rights (freedom of speech, assembly, and so forth)-- Perry v. Sindermann.

43. Henthorn v. Grand Prairie School District, 601 P2d 1243 (1979).

44. The additional reason of ORS 342.835(3)(b)--"Whether the written copy or reasons for dismissal required by this section was supplied"--would presumably be included in the appealable procedure of S.(3)(a) for nonrenewal cases. (For example, one of the appealable procedures may be a failure to supply the teacher with a requested written copy of the reasons for nonrenewal.)

45. Papadopoulos v. Board of Higher Education, 14 Or App 130, (1973). The Oregon Supreme Court and the US Supreme Court declined to review this decision and let it stand, despite the similarity in language ("for any cause deemed/considered in good faith sufficient") between the dismissal and nonrenewal portions of ORS 342.835.

46. Maddox v. Clackamas City School District No. 25, 293 Or 27 (1982).

47. Property rights are a "claim of entitlement" based upon an independent source such as state law. The US Supreme Court has held that property rights in public employment exist only where "cause" must be found for dismissal (If the employment is terminable by the employer "at will" under state law, no property interest attaches). The Oregon Supreme Court held that, although

the statutory requirement of "good faith" is not precisely the same as "cause," it is nevertheless sufficient to give rise to a property interest protected by due process.

48. Maddox, footnote 11, page 36.

49. The court in Maddox (footnote 7, page 36) notes that liberty interests are implicated where an individual's "good name, reputation, honor or integrity" is at stake. The charges against Maddox involved punctuality and a failure to meet deadlines. The court added that, "Whatever the confines of a constitutionally protected liberty interest, these charges are not the sort that implicate that interest."

50. Skeen v. Lane City School District No. 52 (FDAB, 1982).

51. Noel Keith Taylor v. Lincoln City School District (FDAB, 1974).

52. ORS 342.850(2).

53. ORS 183.482(8), see footnote 29.

54. Zollinger v. Warner, 286 Or 19 (1979).

55. Nance v. School District No. 1, City of Portland (FDAB, 1973).

56. Chubb v. Grants Pass School District (FDAB, 1977).

57. School District No. 48, Washington City v. Fair Dis. App. Bd., 514 P2d 1114 (1973).

58. Owen v. Junction City School District No. 69 (FDAB, 1981).

59. Pecka v. Beaverton School District No. 48 (FDAB, 1982).

60. Holcomb v. Jefferson City School District No. 509-J (FDAB, 1982).

61. Brown v. Astoria School District No. 1C (FDAB, 1982).

62. North Clackamas School District No. 12 v. Fair Dis. App. Bd., 30 Or App 855 (1977).

63. Coomes v. State Personnel Board, 215 Cal App 2d 770 (1963).

64. Keene v. Creswell School District No. 40 (FDAB, 1981).

65. The FDAB, considering Ross on remand from the Oregon Supreme Court, said, "If respondent (school district) in this case had had rules indicating what conduct would be cause for dismissal for immorality, the panel believes it would have been required to accept such definition of immorality if the conduct proscribed by those rules were within the legislative intent of the term immorality in ORS 342.835."

This appears to be a misconstruction of the court's holding. The FDAB is required to "consider" but not necessarily to "accept" the district's standards. Nevertheless, it is clear that the board will give a great deal of weight (perhaps deference) to a district's adopted and published standard for immorality.

66. Burton v. Cascade School District Union High School No. 5, 512 F2d 850 (1975). The federal court in this case found the term "immorality" in the statute to be unconstitutionally vague and specifically refused to decide the question of whether such admitted homosexuality may serve as the district's basis in a refusal to hire or rehire. The court refused to reinstate the teacher (though it allowed damages for the wrongful dismissal), relying upon a balancing test and the greater weight of the potential disruption that reinstatement might foreseeably cause.

67. Ewart v. Parkrose School District No 3 (FDAB, 1982).

68. ORS 342.850(1).

69. Inefficiency, inadequate performance, and neglect of duty would

appear more likely to require evidence of district support in improvement than immorality, conviction of a crime, and so forth.

70. In Taylor the FDAB points to the lack of a history on inadequate performance in the evaluations and the fact that the teacher had been receiving regular pay increments as tending to disprove the charge.

71. ORS 342.895(2).

72. The statutory language is "whether the professional performance... is adequate." It is unclear whether this language encompasses such closely related charges as "inefficiency," "neglect of duty," or "failure to show normal improvement." The Oregon Courts in Vorm and Ross have interpreted the latter portion of this statute--"consideration shall be given...to any written standards of performance...adopted by the board"--to include all the grounds listed in ORS 342.865(1).

73. National Labor Relations Board v. Weingarten Corporation 420 U.S. 251 (1975).

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